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No. 97-475

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,
Petitioner,
v.
TSUI YUAN TSENG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

Of Counsel:
ROBERT P. WARREN
DAVID A. BERG
AIR TRANSPORT ASSOCIATION OF AMERICA
1301 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004-1707
(202) 626-4000

WARREN L. DEAN, JR.*
JOSEPH O. CLICK
RICHARD A. KIRBY
PATRICIA N. SNYDER
DYER ELLIS & JOSEPH
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3000
Counsel for Amicus Curiae Air Transport Association of America

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF *AMICUS CURIAE*

The Air Transport Association of America (ATA) respectfully moves to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. The ATA did not seek to file the attached brief within the time permitted by Rule 37.1 because it only learned recently of this case and the potential impact on its member airlines. Counsel for Petitioner and Respondent have given their consent for the ATA to file this brief. The ATA has filed verification of that consent with the Clerk and has also notified the Solicitor General, whom the Court has invited to file a brief.

The ATA considers this case to present issues of national and international importance that warrant review by the Court. As set forth more fully in the attached brief, the decision below undermines the continued viability of the Warsaw Convention and profoundly affects the ability of the ATA's members to implement security measures that assure the safety of 50 million passengers carried annually on international flights by the ATA member airlines.

Respectfully submitted,

WARREN L. DEAN, JR.*
JOSEPH O. CLICK
RICHARD A. KIRBY
PATRICIA N. SNYDER
DYER ELLIS & JOSEPH
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3000
Counsel for Amicus Curiae
Air Transport Association
of America

December 17, 1997

* Counsel of Record

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Air Transport Association of America (ATA), as *amicus curiae*, supports the Petition of El Al Israel Airlines, Ltd. (El Al) for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.[1]

INTEREST OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

The ATA is an association of 22 U.S. and three foreign airlines.[2] The ATA's U.S. members operate within the

[1] No party to this case had any role in drafting this brief or provided any monetary support for its preparation or filing. Supreme Court Rule 37.6. Counsel for Petitioner and Respondent have consented to the filing of this brief. The ATA has filed verification of that consent with the Clerk and has also notified the Solicitor General, whom the Court has invited to file a brief.

[2] The ATA's members are Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Conti-

United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and advocating common industry positions. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of governments and airlines with respect to the uniformity and exclusivity of the liability regime for international air transportation.

First, the primacy of the Warsaw Convention's liability regime (especially now that the world's airlines, with strong U.S. government support, have achieved consensus to waive the Convention's liability limits and certain defenses) is at risk of succumbing to the parochial interests of signatory States in limiting the liability exposure of their national airlines by applying their own local laws. If allowed to stand, the decision below will encourage the application of local law instead of the Warsaw Convention to claims arising in international air transportation.

Second, the decision threatens to subject passengers and airlines to different remedies and standards of liability, depending on the country or the local jurisdiction in which the suit is filed.

Finally, by exposing airlines to liability under local law for required security procedures arising in international air transportation, the court's holding could have a chilling effect on airlines in executing their security responsibilities,

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nental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, KIWI International Air Lines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The ATA's technical, foreign-flag members are Air Canada, Canadian Airlines International, and KLM-Royal Dutch Airlines.

thereby impairing the ability of the United States to protect the safety and security of its citizens.

STATEMENT

Respondent seeks damages under New York state law for emotional injuries allegedly suffered during a routine airline security search conducted in the United States pursuant to El Al's security program. Respondent suffered no physical harm. El Al conducted the search in accordance with a security program approved by the Federal Aviation Administration (FAA) to screen all passengers and baggage prior to boarding.

The district court concluded that Respondent's injuries were caused by an "accident" within the meaning of Article 17 of the Warsaw Convention.[3] The district court found, however, that the injuries were not "bodily injuries" cognizable under Article 17 and that Article 24 of the Convention[4] preempted state law claims for injuries not compensable under Article 17.

The court of appeals reversed, holding that a security search—being a common incident of international air

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[3] Convention for the Unification of Certain Rules Relating to International Tranportation by Air, October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (1934), *reprinted in*, 49 U.S.C. § 40105 note (1994). Article 17 of the Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[4] Article 24 of the Convention states:

> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

travel, and not an "unexpected" or "unusual" event—is not an "accident" for purposes of the Warsaw Convention. Finding the conduct not "covered" by Article 17, the court of appeals held that Article 24 did not preempt the personal injury claims and that Respondent could pursue causes of action under state law unfettered by the Convention's liability limitations.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to review the question whether the Warsaw Convention provides the exclusive remedy for all injuries sustained during international air transportation. Review is warranted because the decision of the court of appeals here directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996), and the decision of the House of Lords of the United Kingdom in *Abnett v. British Airways*, [1997] 1 All E.R. 193 (H.L. 1996).[5]

Review is also warranted because this case presents an important question of federal law that this Court has not decided. The court of appeals' holding that the Warsaw Convention does not apply to certain claims by passengers for injuries sustained during international transportation by air is based on an erroneous premise.

The decision also disrupts the expectation of the international airline industry that the Convention provides the exclusive means of passenger redress. By declaring certain causes of action for injuries sustained in international air transportation to be outside the Convention's coverage, it threatens to disrupt the Convention's uniform liability regime. Moreover, it threatens to upset other international obligations—obligations negotiated with the com-

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[5] The decision of a sister signatory to the Convention is entitled to considerable weight. *Air France v. Saks*, 470 U.S. 392, 404 (1985).

mon understanding of the Convention's exclusivity—governing international air transportation safety.

1. Contrary to the view of the court of appeals, the Warsaw Convention provides the exclusive basis for seeking a remedy for any personal injury incurred during international air transportation. Warsaw Convention, Article 1. This is true whether or not the event can be termed an "accident" for purposes of the Convention.[6] If an "accident" can be found from the facts (as the district court did here) and if the "accident" results in physical injury (which Respondent does not allege), then the Convention provides a remedy.

If, however, an "accident" cannot be found (as the court of appeals held), or if an "accident" is found to have occurred but there is no physical injury (as the district court found), then the Convention does not provide a remedy. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991); *Air France v. Saks*, 470 U.S. 392. In all cases, however, the Convention's uniformity and exclusivity dictate that parties turn to the Convention—and the Convention alone—in seeking redress for personal injuries incurred in international air transportation.

The lower court's reasoning misconstrues the scope of the Warsaw Convention, as applied by the courts of this country, and effectively rewrites Article 17. The court concluded that if personal injuries arising from mandated security measures were not actionable under state law without regard to the Convention, it would lead to "the absurd result of allowing carriers to escape liability for their negligence—or even their intentional torts—so long as the event giving rise to the injury was not an accident . . . ." Pet. App. 20a. The court of appeals failed to recognize that if an airline conducts a security search in

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[6] As noted (*supra* n.3), an airline is liable under Article 17 of the Convention for injuries sustained in the course of international air transportation that result from an "accident." *See Air France v. Saks*, 470 U.S. at 396.

a negligent or intentionally tortious manner, that activity is certainly unexpected by the passenger and unusual for the airline. Such a search would thus be an "accident" covered by the Convention, and the airline would be liable.

In any event, there is nothing absurd about a treaty that precludes liability where no "accident" within its meaning can be found.

2. A principal purpose of the Warsaw Convention is to establish a system for "regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier." Warsaw Convention, Preamble; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629, 636 (1996). Thus, Article 1(1) provides that "[t]his Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Article 1(1).

In 1995, the ATA and the International Air Transport Association achieved a consensus in principle among the world's airlines to exercise the authority granted by the Convention and waive the Convention's liability limit and certain of its defenses.[7] This major milestone was achieved by the aviation industry, governments, and victims groups working together. Many airlines have implemented the agreement by revising their tariffs and conditions of carriage and terminating their participation in an earlier inter-carrier agreement, known as the Montreal Agreement.[8]

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[7] The Warsaw Convention authorizes airlines to agree to additional liabilities by "special contract." Warsaw Convention, Article 22.

[8] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Docket No. 17,325, Order No. E-23680, Agreement CAB 18900 (Civil Aeronautics Board, May 13, 1966). Under the Montreal Agreement, airlines serving the United States agreed to increase the liability limit to $75,000 for passenger injury and death for transportation to, through, or from the United

Other airlines are taking comparable action. Under the new regime, U.S. and foreign airlines:

1) waive the Convention's liability limit for death of, or bodily injury to, passengers;

2) waive the defense of non-negligence for claims up to 100,000 Special Drawing Rights (SDRs);[9] and

3) preserve all other defenses and rights available under the Convention, including any rights of indemnity and contribution.

The Department of Transportation approved this inter-carrier agreement. *See* Docket No. OST-96-1607, Order 97-1-2, 1997 DOT Av. LEXIS 2 (D.O.T. January 8, 1997).

The consensus among the airlines—both foreign- and U.S.-flag—was achieved with the common understanding that the Warsaw Convention provided the exclusive remedy for all injuries incurred during international air transportation. The new regime is intended to secure for U.S. citizens, including the victims of terrorists' attacks, the benefit of a uniform and efficient system providing prompt and adequate compensation for injury or death in international air transportation regardless of the country in which the lawsuit is brought. More important, the new regime's benefits are generally more favorable than the remedies available under the law of many nations.

The precedent established by the court of appeals threatens to take away these benefits for many passengers

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States. Further, the airlines agreed to waive the defense of non-negligence under Article 20(1) of the Convention for claims within that limit.

[9] Special Drawing Rights of the International Monetary Fund are based on exchange rates for U.S., German, British, French, and Japanese currencies. On December 15, one SDR equaled about U.S. $1.35. WALL STREET JOURNAL, December 16, 1997, at C22.

by undermining the principle that the Warsaw Convention provides the exclusive remedy. Exposure to unlimited liability in the United States under federal and state laws, without regard to the Convention, will likely be regarded by airlines as a breach of the understanding upon which this important consensus was based. If permitted to stand, this decision could disrupt the consensus among foreign airlines to waive the liability limits and thus derail this ongoing implementation process.

Equally disturbing is the prospect that, if the Convention is not exclusive, foreign courts will be encouraged to declare particular claims to be outside the Convention's scope, subjecting passengers (including U.S. citizens) to less favorable foreign law and depriving them of these new protections.[10] In this regard, the term "accident" has been interpreted broadly to refer to those events for which compensation should be provided by airlines. The Second Circuit, however, interpreted the term "accident" for the purposes of determining those claims that were "within the

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[10] The Second Circuit's decision relies on Article 24's reference to cases "covered by" Article 17. The 1971 Guatemala City Protocol proposed to amend Articles 17, 22, 24, and 25 of the Convention to make the liability of the carrier absolute and its limits unbreakable. *See* R. Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972). In doing so, the Protocol would delete Article 24's reference to cases "covered by" Article 17 (dealing with death or injury to passengers) and would amend its language to "[i]n the carriage of passengers and baggage any action for damages, however founded, ..." There is no suggestion in the documentation that this change was intended to effect a substantive change in the exclusivity of the Convention. Indeed, although the Senate has not ratified the Guatemala City Protocol, the Senate Foreign Relations Committee, which on several occasions has reported the Protocol favorably to the Senate, viewed the amendment of Article 24 as "mak[ing] clear that actions for damages whether founded upon the 'Convention' or in contract or in tort or otherwise' can only be brought subject to the conditions and limits set out in the Convention." S. REP. NO. 97-45, at 12 (1981); *see also* S. REP. NO. 101-21, at 15 (1990); S. REP. NO. 98-1, Executive B, at 17 (1983).

contemplation of the drafters of the Convention." Pet. App. 20a. This could lead to narrow definitions of the term "accident" in cases brought in foreign courts where national law is significantly less favorable to passengers than the Convention's rules.

3. Countries signatory to the Convention have consistently relied upon the uniformity *and exclusivity* of the Warsaw Convention's liability regime in developing and implementing important international aviation obligations and practices. Security programs required of airlines by countries that have signed the Warsaw Convention, including the United States, involve a complex web of international agreements that are grounded on the view that the Warsaw Convention provides the exclusive recourse for injured passengers. Changing this exclusivity premise threatens to undermine these security measures.

The overwhelming majority of the parties to the Warsaw Convention are also party to the 1944 Chicago Convention, the main purpose of which is to promote safety and order in international civil aviation.[11] Under Annex 17 of that Convention, signatory countries must establish and maintain effective measures to protect the security of international civil aviation. *See* International Civil Aviation Organizaiton (ICAO), *International Standards and Recommended Practices, Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, Annex 17 to the Chicago Convention (6th ed. 1997).[12]

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[11] *See* Article 44 of the Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. *See also* NICOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 187 (1981).

[12] To further develop a uniform security system, other international agreements to which the United States is party impose on signatory countries requirements designed to counter terrorist acts. *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, September 24, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure

While the Chicago Convention and Annex 17 thereto recognize airline security as a sovereign police function, the United States has entrusted airlines with the bulk of that responsibility. Under U.S. law, the Federal Aviation Administrator sets screening standards and requires U.S. and foreign airlines to establish security programs. 49 U.S.C. §§ 44901-44915.

The FAA has extensive regulations regarding the security measures that must be taken by airports (14 C.F.R. Part 107), airlines (14 C.F.R. Part 108), indirect air carriers (such as freight forwarders) who engage indirectly in air transportation of property (14 C.F.R. Part 109), and foreign airlines operating to and from the United States (14 C.F.R. Part 129). Airline security programs must be filed with, and approved by, the FAA. 14 C.F.R. §§ 108.5, 108.7(a)(4).

Congress has also enacted legislation to assure that foreign airports provide safety and security to the flying public. Under Section 551 of the International Security Development and Cooperation Act, Pub. L. 99-83, § 551(a), 99 Stat. 190, 222-25 (1985), the Department of Transportation periodically assesses the effectiveness of security measures maintained at foreign airports through which U.S. travelers pass, applying ICAO standards. 49 U.S.C. § 44907(a)(2)(C).

The elaborate system of international rules governing airline security upon which U.S. law is based was developed with a common understanding among nations that airline liability would be governed exclusively by the Warsaw Convention, which predated those rules by dec-

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of Aircraft, December 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, February 24, 1988, T.I.A.S. 7570, 27 I.L.M. 627.

ades. There has been no recognition that local tribunals can regulate, or otherwise impose liability upon, airlines for the normal implementation of these solemn obligations. "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933).

The Second Circuit decision ignores this reliance and thus fails to appreciate the effects of its decision on international airline security. It is now well established that the Warsaw Convention governs an airline's liability to passengers for terrorist attacks, including hijacking. *See Air France v. Saks*, 470 U.S. at 405; *see, e.g., Pflug v. Egyptair Corp.*, 961 F.2d 26 (2d Cir. 1992); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1269 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Margrave v. British Airways*, 643 F. Supp. 510 (S.D.N.Y. 1986); *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656 (S.D.N.Y. 1985).

Accordingly, U.S. courts have made clear that the Convention imposes "close to absolute liability" (Pet. App. 13a) for passenger injury and death arising from an airline's negligence in failing to conduct security searches. *See, e.g., In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 811 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

The Second Circuit's holding places airlines in an untenable situation. On the one hand, it subjects them to strict liability under the Convention for failing to conduct a search. On the other hand, it subjects them to potentially unlimited liability under the laws of the various states in the United States for conducting such a

search—even where, as here, the search conforms to procedures mandated by U.S. and international law, and approved by the FAA. This result is not only unfair, but plainly inconsistent with the maintenance of an effective security program.

Even more troubling, the airline employees conducting these searches will no longer be able to rely on the Convention as circumscribing their liability. *See Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). The Second Circuit's decision adds an additional consideration into the mix of complex factors employees weigh in determining whether to search any particular passenger: whether the passenger is likely to sue them for unlimited damages if the search does not disclose a weapon or explosive device. The decision thus not only defeats the Convention's purpose of unifying liability rules for airlines, but also threatens to compromise the security of airlines and passengers.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Of Counsel:
ROBERT P. WARREN
DAVID A. BERG
AIR TRANSPORT ASSOCIATION OF AMERICA
1301 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004-1707
(202) 626-4000

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WARREN L. DEAN, JR.*
JOSEPH O. CLICK
RICHARD A. KIRBY
PATRICIA N. SNYDER
DYER ELLIS & JOSEPH
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3000
Counsel for Amicus Curiae Air Transport Association of America

* Counsel of Record